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No. 72-223

In the Supreme Court of the United States

BERNIE and RUTH HAHN,

Petitioners,

vs.

NORWEGIAN AMERICA LINE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTRODUCTION

Respondent makes a suggestion with which petitioners wholeheartedly concur since it goes to the heart of this case: examine respondent's ticket. A copy of the ticket issued to petitioners is reproduced to actual size in Appendix C to the petition (App. 17-19).

The examination discloses a reference in small print on the front of the ticket to two pages containing 22 lengthy paragraphs of provisions, all in fine print. These 22 provisions contain several thousand words. Not one of the

provisions benefits the passenger. The total result is an onerous and unconscionable "contract."*

Not surprisingly, respondent finds itself able to invoke one of these provisions in an attempt to evade liability in this action, *i.e.*, a provision which purports to shorten the time to file suit from five years under the applicable Illinois statute to 120 days.

This case has ramifications far beyond its individual facts. The issue squarely before this Court, and not answered by respondent, is whether corporations may foist upon the unsuspecting public one-sided exculpatory provisions buried in lengthy form contracts. Millions of citizens unwittingly fall prey to similar provisions. This case presents a unique opportunity for this Court to speak out on this unconscionable practice because it falls within federal maritime jurisdiction. Grounds for granting the petition are unquestionably present.

I.

RESPONDENT'S BRIEF SHOWS THE IMPORTANCE OF RESOLVING THE CONFLICT BETWEEN THE DECISIONS OF THIS COURT AND THE SECOND CIRCUIT WITH THE DECISION BELOW.

(Reply to Part I.)

In *The Majestic*, 166 U.S. 375 (1897), this Court held that fine-print exculpatory provisions contained on the

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* Respondent states (p. 3) that the reverse side of the ticket sets forth the "respective rights and obligations" of the parties. A review of these finely printed provisions, however, will fail to disclose any "right" accorded the passenger. Rather, all 22 paragraphs serve only to shield respondent from almost every conceivable type of liability.

backside of a passenger's ticket were ineffective in limiting a steamship company's liability. The front of the ticket contained a notice referring to these provisions which was similar, if not superior, to the notice in respondent's form of ticket. 166 U.S. at 376-78. This Court stated that, under the well-established rule in England which is also the law in this country, for such exculpatory provisions to be effective the passenger must have *actual* knowledge of the provisions "unless [the provisions are] referred to in the *body* of the contract." (Emphasis added.) 166 U.S. at 382-84. In *The Majestic*, this Court expressly adopted a salutary policy condemning the use of fine-print clauses in steamship passenger tickets.

In subsequent decisions interpreting *The Majestic*, the Second Circuit has held that actual notice to the passenger is excused only if the provisions are incorporated into the "box" of the ticket which is considered to be the body of the contract. *The Kungsholm*, 86 F.2d 703, 704 (2d Cir. 1936); *Maibrunn* v. *Hamburg-American S.S. Co.*, 77 F.2d 304 (2d Cir. 1935); *Mayer* v. *Zim Israel Navigation Co.*, 177 F.Supp. 69 (S.D.N.Y. 1959), *aff'd*, 289 F.2d 562 (2d Cir. 1961), *cert. denied*, 368 U.S. 889 (1961). See also, *Toohill* v. *Cunard Steamship Co.*, 130 F.Supp. 128, 129 (D.Mass. 1955).

It is undisputed that petitioners did not have actual notice of the provision relied on by respondent and there was no reference to it in the box of the ticket. Therefore, the decision below irreconcilably conflicts with the decision in *The Majestic* and its Second Circuit progeny.

Respondent cites no decisions of this Court which in any way support the decision of the Seventh Circuit and does not contest the fact that the Seventh Circuit

applied a completely different test than that established by this Court. Furthermore, the lower court cases cited by respondent (Brief, pp. 11, 16-19) all applied the objective test of *The Majestic* rather than the novel subjective test adopted by the Seventh Circuit. These cases do not lend any support to the Seventh Circuit's decision on the facts since each involved a ticket containing a reference to the exculpatory provisions within the area containing the essential terms.

The cases cited by respondent emphasize that for the last seventy years the Second Circuit has consistently applied the objective standard established by this Court in *The Majestic,* as opposed to the subjective standard adopted by the Seventh Circuit. The unprecedented approach adopted by the Seventh Circuit should be rejected as is evident from the gross injustice worked by it in the case at bar.

This Court should put to rest whether *The Majestic* is still the law and should resolve the conflict between that decision and the Second Circuit decisions cited by petitioner with the decision below. Otherwise, companies governed by federal law will continue to use one-sided, fine print provisions to the detriment of unsuspecting consumers.

II.

RESPONDENT'S MISLEADING DISCUSSION EVADES PETITIONERS' SECOND REASON FOR GRANTING THE PETITION.

(Reply to Part II.)

Respondent is correct that there is no federal maritime limitations statute governing the instant action. However, it is well-established that state statutes of limitation govern

in the absence of federal statutes of limitation. *E.g., Daly* v. *Columbia Broadcasting System, Inc.*, 309 F.2d 83, 86 (1962) (Illinois statute governs in federal question case under Federal Communications Act).

The important point, not answered by respondent, is whether a corporation may avoid liability by relying on fine-print provisions in lengthy form contracts. The danger of permitting corporations to foist one-sided terms, such as the one relied upon by respondent, on consumers was recently recognized by the Indiana Supreme Court in *Weaver* v. *American Oil Co.*, 276 N.E.2d 144, 147-48 (Ind. 1972), which stated:

> "When a party can show that the contract, which is sought to be enforced, was in fact an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, causing a great hardship and risk on the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, *should not be enforceable on the grounds that the provision is contrary to public policy.* The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting." (Emphasis added.)

In this case, there can be no doubt that there was no negotiation over respondent's boilerplate clauses. Petitioners, as most consumers, had no opportunity to bargain with respect to predetermined, one-sided conditions. Petitioners were simply told that they were buying an expensive cruise ticket and that various accommodations would be provided aboard ship. They certainly were not told that by accepting the ticket they practically abrogated their

right to sue respondent for its fraudulent representations concerning the cruise.

The not uncommon lopsided bargaining situation by which petitioners were victimized should be rectified by this Court. In the absence of a true meeting of the minds, fine-print clauses buried in form contracts governed by federal law should be declared invalid and unenforceable.

III.

THIS COURT SHOULD CONSIDER WHETHER DUE PROCESS PERMITS UNKNOWING WAIVER OF A STATUTORY LIMITATIONS PERIOD.

(Reply to Part III.)

The Illinois legislature has declared that a party to a contract, such as that involved in the instant case, should have five years in which to commence suit. Ill. Rev. Stat., 1971, ch. 83, §16. The legislative policy of this limitations period, upon which petitioners justifiably relied, should not be nullified.

In *Turoff* v. *Eastern Airlines*, 129 F.Supp. 319, 321 (N.D. Ill. 1955), the court held that a provision contained in an airline passenger's ticket shortening the statutory limitations period was unenforceable because the carrier had not demonstrated that the passenger actually knew of and accepted the provision. The Court recognized that this result was dictated by the policy of *The Majestic*:

> "The rule has been succinctly stated, however, that the terms of such a contract must be '*distinctly declared and deliberately accepted.*' [Citing *The Majestic*] . . . It must also be observed that Eastern has not alleged that the present plaintiff had knowledge of the limitation provision . . . and, nevertheless, knowingly accepted them as part of the contract of carriage." (Emphasis added.)

No such "knowing acceptance" exists in the case at bar regarding the four month limitations provision on the back of petitioners' ticket. Petitioners never read their ticket, nor were they ever advised by respondent of the existence of this provision. Petitioners justifiably acted under the assumption that their right to bring suit was protected by the Illinois statute which provides a 5 year limitations period. Under these circumstances, enforcement of the four month limitations provision amounts to a practical abrogation of the right to bring suit.

CONCLUSION

This Court should grant this petition to resolve the important issues raised by the decision below.

Respectfully submitted,

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